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OBATA-AMBAK HOLDINGS SDN BHD v. PREMA BONANZA SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
ABU BAKAR JAIS JCA
B LEE HENG CHEONG JCA
[CIVIL APPEAL NOS: W-02(IM) (NCVC)-1204-06-2021
& W-02(IM) (NCVC)-1205-06-2021]
16 MARCH 2022

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Abstract – *The plaintiff, in claiming for liquidated ascertained damages and applying for summary judgment, was challenging the validity of certain clauses in the sale and purchase agreements which reflected an extension of time to complete a housing project. Since the plaintiff's challenge was against the clauses of the sale and purchase agreements from its inception, the plaintiff's cause of action ran from the date of its execution. Thus, the claim was barred by limitation as the six-year period had expired and limitation had already set in.*

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CIVIL PROCEDURE: *Striking out – Appeal against – Appeal against decision of High Court striking out purchaser's application for summary judgment – Housing developers – Sale and purchase agreement ('SPAs') – Developers granted extension of time to complete housing project from period of 36 months to 54 months – Whether reflected in clauses of SPAs entered into between purchaser and developer – Whether purchaser entitled to claim liquidated ascertained damages for late*

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delivery outside of scope of SPAs – Purchaser challenged validity of clauses in SPAs – Whether purchaser's cause of action ran from date of execution of SPAs – Whether limitation set in – Whether purchaser's claim time barred – Limitation Act 1953, s. 6(1) – Housing Development (Control and Licensing) Regulations 1989, reg. 11(3)

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LAND LAW: *Housing developers – Sale and purchase agreement ('SPAs') – Developers granted extension of time to complete housing project from period of 36 months to 54 months – Whether reflected in clauses of SPAs entered into between purchaser and developer – Whether purchaser entitled to claim liquidated ascertained damages for late delivery outside of scope of SPAs – Purchaser applied for summary judgment – Purchaser challenged validity of clauses in SPAs – Whether purchaser's*

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cause of action ran from date of execution of SPAs – Whether limitation set in – Whether purchaser's claim time barred – Limitation Act 1953, s. 6(1) – Housing Development (Control and Licensing) Regulations 1989, reg. 11(3)

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LIMITATION: *Cause of action – When time began to run – Sale and purchase agreement ('SPAs') – Developers granted extension of time to complete housing project from period of 36 months to 54 months – Whether reflected in clauses of SPAs entered into between purchaser and developer – Whether purchaser entitled to claim liquidated ascertained damages for late delivery outside of scope of SPAs – Purchaser applied for summary judgment – Purchaser challenged validity of clauses in SPAs – Whether purchaser's cause of action ran from date of execution of SPAs – Whether limitation set in – Whether purchaser's claim time barred – Limitation Act 1953, s. 6(1)*

The respondent ('defendant') was the developer of a housing project, The Sentral Residences ('The Sentral Residences'). In view of the magnitude of the housing project, the defendant had applied to the Ministry of Housing and Local Government ('the Ministry') for an extension of time to complete the project. In exercising its powers under reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ('HDR'), the Ministry granted an extension of time ('EOT') to complete the housing project, from a period of 36 months to 54 months. The EOT granted by the Ministry was reflected in cls. 25 and 27 of the sale and purchase agreements, subsequently entered into by the defendant and the purchasers of The Sentral Residences. The appellant ('plaintiff') as the purchaser had entered into a prescribed statutory sale and purchase agreement ('SPA') with the defendant for the purchase of two parcel units ('the said property') in the residential project. The SPAs signed between the parties was in the prescribed statutory form under Schedule H of the HDR, as mandated by reg. 11(1) of the HDR. The plaintiff had voluntarily entered into the SPAs for the two parcels, where the prescribed time of 54 months for delivery was clearly reflected in cls. 25 and 27 of the SPAs. Thereafter, upon the completion of the development, the defendant issued the notice for vacant possession to the plaintiff. The plaintiff was deemed to have taken possession on 8 February 2017, pursuant to cl. 26(3) of the SPAs. There was a late delivery of the properties under the SPAs. Before filing this suit, the plaintiff had accepted liquidated ascertained damages ('LAD') from the defendant for late delivery under cls. 25 and 27. Based on the decision of the Federal Court in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals,* the plaintiff took the position that it was entitled to claim LAD outside the scope of the SPAs, based on the 36 months delivery period under Schedule H of the HDR. Despite accepting the LAD from the defendant based on the SPAs, the plaintiff then commenced these proceedings against the defendant, seeking certain reliefs. The plaintiff filed an application for summary judgment against the defendant ('SJ application') under the Rules of Court 2012 ('ROC') while the defendant filed an application under O. 14A of the ROC to determine the plaintiff's case on questions of law ('14A application'). The High Court allowed the defendant's 14A application and

struck out the plaintiff's SJ application on the grounds, *inter alia*, that the plaintiff's claim was time barred. Hence, the appeals herein against the decisions of the High Court.

Held (dismissing appeals)
Per Azizah Nawawi JCA delivering the judgment of the court:

(1) When the plaintiff executed the SPAs, both cls. 25 and 27 specified that vacant possession shall be delivered within 54 months from the date of the signing of the SPAs. Therefore, what the plaintiff was now claiming was that the defendant had purportedly amended both cls. 25 and 27 of the SPAs, from 36 months to 54 months, based on the EOT granted by the Ministry. In other words, the plaintiff was challenging the validity of both cls. 25 and 27 of the SPAs, from the date of the signing/execution of the SPAs. This challenge was premised on a breach of Schedule H in *Ang Ming Lee*. The plaintiff was therefore challenging the validity of the purported amendment to both cls. 25 and 27 of the SPAs, from the inception or execution of the SPAs. (paras 31-33)

(2) The contractual breach that the plaintiff was complaining about was the purported amendment to both cls. 25 and 27. Since the plaintiff was challenging both cls. 25 and 27 of the SPAs from the inception or execution of the SPAs, then the plaintiff's cause of action ran from the date of the execution of the SPAs, that was, on 11 July 2012 and 18 July 2012 respectively. Therefore, the plaintiff's claim was barred by limitation, as the six-year period had expired on 10 July 2018 and 17 July 2018 respectively. Since this suit was filed on 18 June 2020, limitation had already set in. On this ground alone, the appeals were dismissed. (paras 33 & 34)

Case(s) referred to:
Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(refd)***
CIMB Bank Bhd v. Sebang Gemilang Sdn Bhd & Anor [2018] 5 CLJ 129 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Government Of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***
Lim Yee Khei v. Berjaya Times Square Sdn Bhd [2003] 1 CLJ 527 HC ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
Toh Tiam Cheow & Ors v. Berjaya Times Square Sdn Bhd [2002] 4 CLJ 301 HC ***(refd)***

Legislation referred to:
Housing Development (Control and Licensing) Regulations 1989, reg. 11(1), (3)
Limitation Act 1953, s. 6(1)
Rules of Court 2012, O. 14A

For the appellant - Wong Renn Xin; M/s KL Wong
For the respondent - Lai Chee Hoe & Ooi Xin Yi; M/s Chee Hoe & Assocs

[Editor's note: For the High Court judgment, please see Obata Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Cases [2021] 10 CLJ 596 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Azizah Nawawi JCA:

Introduction

[1] There are two appeals before this court:

(i) Civil Appeal No: W-02(IM)(NCVC)-1204-06-2021 is an appeal against the decision of the High Court to strike out the appellant's application for summary judgment under O. 14 of the Rules of Court 2012 ("Appeal 1204"); and

(ii) Civil Appeal No: W-02(IM)(NCvC)-1205-06-2021 is an appeal against the decision of the High Court Judge to allow the respondent's application under O. 14A of the Rules of Court 2012 ("Appeal 1205").

[2] The appellant was the plaintiff at the High Court and the respondent was the defendant. Parties will be referred to as they were at the High Court hereafter.

The Salient Facts

[3] The defendant is a company incorporated in Malaysia under the Companies Act 2016, and is the developer of the housing project, The Sentral Residences ("The Sentral Residences"):

[4] In view of the magnitude of the housing project, the defendant had applied to the Ministry of Housing and Local Government ("the Ministry") for an extension of time to complete the project. In exercising its powers under reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ("HDR 1989"), on or about 16 December 2010, the Ministry granted an extension of time ("EOT") to complete the housing project, from a period of 36 to 54 months. The EOT granted by the Ministry is reflected in cls. 25 and 27 of the sale and purchase agreements, subsequently entered into by the defendant and the purchasers of The Sentral Residences.

[5] The plaintiff, as the purchaser had entered into a prescribed statutory sale and purchase agreement ("SPA") with the defendant for the purchase of two parcel units ("the said property") in the residential project, The Sentral Residences, and the particulars are as follows:

Purchaser's Name	Unit No.	Date of SPA	Purchase Price (RM)
OBATA-AMBAK HOLDINGS SDN BHD	A-31-G (A-31-7)	11.07.2012	RM2,126,000.00
OBATA-AMBAK HOLDINGS SDN BHD	A-31-F (A-31-6)	18.07.2012	RM1,662,000.00

[6] The SPAs, signed on 11 July 2012 and 18 July 2012 respectively, between the parties was in the prescribed statutory form under sch. H of the HDR 1989, as mandated by reg. 11(1) of the HDR 1989.

[7] It is not in dispute that the plaintiff had voluntarily entered into the SPAs on 11 July 2012 and 18 July 2012 respectively, for the two parcels, where the prescribed time of 54 months for delivery was clearly reflected in cls. 25 and 27 of the SPAs:

> Clause 25 Time for delivery of Vacant Possession
>
> (1) Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in Clause 26 within fifty-four (54) calendar months from the date of this Agreement.
>
> (2) If the Vendor fails to deliver vacant possession in the manner stipulated in Clause 26 within the time stipulated in sub-clause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the expiry date of the delivery of vacant possession in sub-clause (1) until the date the Purchaser takes vacant possession of the said Parcel. Such liquidated damages shall be paid immediately upon the date the Purchaser takes vacant possession of the said Parcel.

(3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.

27. Completion of common facilities

(1) The common facilities serving the said housing development shall be completed by the Vendor within fifty-four (54) calendar months from the date of this Agreement. The Vendor's architect shall certify the date of completion of the common facilities.

(2) If the Vendor fails to complete the common facilities in time the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centrum (20%) of the purchase price.

(3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Vendor completes the common facilities.

[8] Thereafter, upon the completion of the development, the defendant issued the notice for vacant possession dated 25 January 2017 to the plaintiff. The plaintiff is deemed to have taken possession on 8 February 2017, pursuant to cl. 26(3) of the SPAs.

[9] There was a late delivery of the properties under the SPAs. Before filing this suit, the plaintiff had accepted liquidated ascertained damages ("LAD") from the defendant for late delivery under cls. 25 and 27. Payment of RM10,017.53 was made in respect of parcel A-31-F and RM16,891.51 in respect of parcel A-31-G *via* two settlement letters, both dated 14 March 2017.

[10] Based on the decision of the Federal Court in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162, the plaintiff took the position that it is entitled to claim LAD outside the scope of the SPAs, based on the 36 months delivery period under sch. H of the HDR 1989, and the details of the LAD are as follows:

Purchaser's Name	**Unit No.**	**Purchase Price x % x Total Number of Days Late/365 Days (RM)**	**LAD (RM)**
OBATA-AMBAK HOLDINGS SDN BHD	A-31-G (A-31-7)	RM2,126,000.00 x 10% x (550/365) = RM320,356.16 RM2,126,000.00 x 2% x (550/365) = RM64,071.23	RM384,427.39

Purchaser's Name	Unit No.	Purchase Price x % x Total Number of Days Late/365 Days (RM)	LAD (RM)
OBATA-AMBAK HOLDINGS SDN BHD	A-31-F (A-31-6)	RM1,662,000.00 x 10% x (550/365) = RM250,438.36 RM1,662,000.00 x 2% x (550/365) = RM50,087.67	RM300,526.03
		TOTAL	**RM684,953.42**

[11] Despite accepting the LAD from the defendant based on the SPAs, the plaintiff then commenced these proceedings against the defendant, seeking for the following reliefs:

(a) Satu deklarasi bahawa apa-apa surat yang diberikan untuk perlanjutan masa (jika ada) di bawah peraturan 11(3) Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Perlesenan) 1989 untuk Defendan untuk menyerahkan milikan kosong ("vacant possession") Hartanah tersebut kepada Plaintiff dan melengkapkan kemudahan bersama ("common facilities") dari tempoh masa tiga puluh enam (36) bulan ke lima puluh empat (54) bulan adalah tidak sah selaras dengan keputusan Mahkamah Persekutuan dalam kes *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162;

(b) Satu deklarasi bahawa Defendan adalah dikehendaki mematuhi dan terikat kepada Jadual H Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 untuk menyerahkan milikan kosong ("vacant possession") Hartanah tersebut kepada Plaintiff dan melengkapkan kemudahan bersama ("common facilities") dalam tempoh masa tiga puluh enam (36) bulan dikira dari tarikh Perjanjian Jual Beli tersebut ditandatangani;

(c) Satu perintah bahawa Defendan dikehendaki membayar kepada Plaintiff untuk ganti rugi tertentu untuk kelewatan penyerahan milikan kosong ("vacant possession") Hartanah tersebut dan pelengkapan kemudahan bersama ("common facilities") seperti berikut:

(i) Defendan adalah diperintahkan untuk membayar kepada Plaintif jumlah wang sebanyak RM684,953.42;

(ii) Faedah pada kadar 5% setahun ke atas jumlah RM684,953.42 dikira dari tarikh tindakan ini difailkan sehingga tarikh pembayaran penuh.

[12] On 7 August 2020, the plaintiff filed the application for summary judgment against the defendant ("SJ application") under the Rules of Court 2012 ("ROC 2012"). On 20 November 2020, the defendant filed an application under O. 14A of the ROC 2012 to determine the plaintiff's case on questions of law ("14A application").

Decision Of The High Court

[13] On 18 May 2021, the learned High Court Judge delivered his decision. The learned judge had allowed the defendant's O.14A of the ROC 2012 application and struck out the summary judgment application by the plaintiff, primarily based on the following grounds:

(i) that the plaintiff's claim is time-barred;

(ii) that the plaintiff is required to challenge the EOT by way of judicial review; and

(iii) that there is waiver or estoppel against social legislations.

Our Decision

[14] The central feature of appellate intervention is trite, that is to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. This had been explained by the Federal Court in the case of *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1, where the Federal Court held as follows:

> [14] In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, *ie*, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. *The Court of Appeal further reiterated the principle central to appellate intervention, ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal.* This is consistent with the established plainly wrong test. (emphasis added)

[15] In another case, the Federal Court in *CIMB Bank Bhd v. Sebang Gemilang Sdn Bhd & Anor* [2018] 5 CLJ 129; [2018] 3 MLJ 689 held as follows:

A [38] The issue of knowledge of the equitable assignment is entirely a question of facts. Both the courts below concluded that the appellant had knowledge of the equitable assignment based on the facts and circumstances of the case. *It is trite law that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its judicial decision or there has been no or insufficient judicial appreciation of evidence* (see *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1). (emphasis added)

[16] Bearing in mind the above cases, we will now deal with the issues raised by the parties.

C *Issue (i) – Whether The Plaintiff's Claim For LAD Is Statute Barred*

[17] Parties are on common ground that there is no dispute with regard to the material facts. This can be seen from the plaintiff's application for summary judgment and the defendant's application under O. 14A of the ROC 2012. In fact, the crux of both appeals is on the issue of limitation. If this D court finds that the plaintiff's claim is filed within the limitation period, both appeals should be allowed. However, if the plaintiff's claim is barred by limitation, then both appeals should be dismissed.

[18] Before we consider the submissions of both parties on this issue, it is instructive for us to refer to the meaning of a 'cause of action' in *Government* E *Of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12, where it was held as follows:

What then is the meaning of "a cause of action"? *A "cause of action" is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a* F *Defendant in an action.* Lord Diplock in *Letang v. Cooper* [1965] 1 QB 232 at P 242 defined "a cause of action" to mean "a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person". In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the Respondent/plaintiff has a right either at law or by statute and that, G secondly, such right has been affected or prejudicated by the Appellant/ Defendant's act. (emphasis added)

[19] In *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32, the Federal Court recognises that the right to bring an action may arise on various events, but it has always been held that the statute runs from the earliest time at H which an action could be brought and from the date when that right is infringed or there is a threat of its infringement:

A "cause of action" is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v. Brown* (1888) I 22 QBD 128 131). In *Reeves v. Butcher* (1891) 2 QB 590 511 Lindley LJ said:

> "This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland* LR 4 QB 509 511, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; *but it has always been held that the statute runs from the earliest time at which an action could be brought.*
>
> In *Board of Trade v. Cayzer, Irvine & Co* [1927] AC 610 at p 617. Viscount Dunedin described 'cause of action' as that which makes action possible. *Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach.* In the case of actions founded on contract, therefore, time runs from breach (per Field X in *Gibbs v. Guild* 8 QBD 296 at p 302). *In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see Bolo's case LR 57 IA 74). It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.* (emphasis added)

[20] As such, where the cause of action is founded on contract, time runs from the date of the breach of the contract. Since the plaintiff's claim for LAD is premised on contract, the provision on limitation under s. 6(1) of the Limitation Act 1953 expressly provides that:

> Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say
>
> (a) Actions founded on a contract or on tort

[21] In the present appeals, it is the submission of the plaintiff that their cause of action to claim for LAD shall accrue on the date the plaintiff takes vacant possession of the properties. This is based on cl. 25(3) of the SPA, which reads as follows:

> For the avoidance of doubt, any cause of action to claim for liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser take vacant possession of the said Parcel.

[22] It is, therefore, the submission of the plaintiff that the cause of action shall accrue on the date when the plaintiff/purchaser is deemed to have taken delivery of vacant possession of the properties. For the plaintiff, the cause of action accrued on 8 February 2017 (VP Notice + 14 days) and the six years limitation period shall expire on 7 February 2023. In the present action, since the plaintiff's claim herein was filed on 18 June 2020, it is therefore well within the limitation period.

[23] The plaintiff relied on the decision of the High Court in *Toh Tiam Cheow & Ors v. Berjaya Times Square Sdn Bhd* [2002] 4 CLJ 301, where Arifin Zakaria J (later CJM) held as follows:

A It would appear that based on cl. 22(2) liquidated damages only become due and payable at the date of the delivery of vacant possession. Thus, prior to that no liquidated damages could be claimed by the plaintiffs as it could not as yet be ascertained.

[24] The case of *Toh Tiam Cheow & Ors v. Berjaya Times Square Sdn Bhd* (*supra*) was followed in *Lim Yee Khei v. Berjaya Times Square Sdn Bhd* [2003] 1 CLJ 527, where Heliliah Mohd Yusoff J (later FCJ) echoed the same view as follows:

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The background facts of the case is also similar to the present one and the clauses considered by the court are also in *pari materia*. The learned judge Ariffin Zakaria J, as he then was, premised his decision that the core issue in the case turns on the construction of cl. 22(2) of the agreement in that case and the clause was as follows:

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> 22(2) If the Developer fails to hand over vacant possession of the Premises within the Extended Period, the Developer shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of twelve per centum (12%) per annum of the Purchase Price from the date of the expiry of the Extended Period up to the day of delivery of vacant possession of the Premises.

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In his judgment the learned judge stated:

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> It would appear that based on clause 22(2) liquidated damages only become due and payable at the date of the delivery of vacant possession. Thus, prior to that no liquidated damages could be claimed by the plaintiffs as it could not as yet be ascertained.

F **[25]** We would agree with the plaintiff/appellant if the plaintiff's claim for LAD is simply based on cls. 25 and 27 of the SPAs, where the delivery period of the properties was agreed/contracted at 54 months.

[26] However, the plaintiff's claim herein is not based on cls. 25 and 27 of the SPAs which the parties have signed. The plaintiff's cause of action can G be seen from paras. 6, 7, 8 and 9 of the statement of claim, which are as follows:

6. Perjanjian jual beli tersebut yang ditandatangani antara Plaintif dan Defendan adalah tidak mengikut peruntukan undang-undang yang sedia ada dan/atau telah melanggari bentuk perjanjian jual beli di bawah jadual H sebagaimana yang diperuntukkan di bawah Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 di mana **tempoh masa penyerahan milikan kosong telah dipinda dari tempoh masa tiga-puluh enam (36) bulan kepada lima puluh empat (54) bulan.**

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7. **Defendan telah bertindak secara salah dan/atau telah melanggari peruntukan undang-undang** yang sedia ada iaitu Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 dan Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 **dengan meminda tempoh masa penyerahan milikan kosong daripada tiga-puluh enam (36) bulan kepada lima puluh empat (54) bulan.**

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8. Oleh itu apa-apa pindaan yang dibuat oleh Defendan dalam Perjanjian Jual Beli tersebut yang bercanggahan dengan jadual H Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 adalah tidak sah dan tidak mengikat Plaintif.

9. Justeru itu, Defendan adalah masih terikat untuk menyerahkan belikan kosong dalam tempoh masa tiga puluh enam (36) bulan selaras dengan jadual H Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989. (emphasis added)

[27] From the above pleadings, it is the pleaded case of the plaintiff that the SPAs, which were executed by both the plaintiff and the defendant on 11 July 2012 and 18 July 2012 respectively, had breached Schedule H of the HDR 1989 when the period to deliver vacant possession of 36 months was amended to 54 months.

[28] The plaintiff further claimed that by the said amendment, the defendant had breached the Housing Development (Control and Licensing) Act 1966 and sch. H of the HDR 1989. Therefore, the said amendment (that is, amending the delivery period from 36 to 54 months), which is in breach of sch. H of the HDR 1989, is invalid and is not binding on the plaintiff. As such, the defendant is still bound to deliver vacant possession within 36 months, not 54 months as stipulated in the SPAs that was executed by the parties.

[29] Therefore, in gist, on its pleaded case, the plaintiff's cause of action is that:

(i) that the SPAs were invalid at the time of signing, as the SPAs had failed to comply with the prescribed Schedule H; and

(ii) that the defendant has breached Schedule H of the HDR 1989, by amending the time for delivery of vacant possession from 36 months to 54 months.

[30] Based on the above-mentioned pleadings, the plaintiff therefore applied for a declaration that the EOT granted by the Ministry in 2010 is invalid premised on the decision of the Federal Court in *Ang Ming Lee* (*supra*) and a declaration that the defendant is bound by sch. H of the HDR 1989 to deliver vacant possession within 36 months from the date of execution of the SPAs.

[31] It is not in dispute that when the plaintiff executed the SPAs, both cls. 25 and 27 specified that vacant possession shall be delivered within 54 months from the date of the signing of the SPAs. It is also not in dispute that the plaintiff did not make any allegation of fraud against the defendant.

[32] Therefore, what the plaintiff is now claiming is that the defendant had purportedly amended both cls. 25 and 27 of the SPAs, from 36 months to 54 months based on the EOT granted by the Ministry on/around 16 December 2010. This amendment was made to all the SPAs, for the purpose of selling all the parcels of The Sentral Residences, and this amendment was made before the plaintiff executed the SPAs. This amendment, which was made to the SPAs, according to the plaintiff, is in breach of sch. H of the HDR 1989, and is therefore invalid. This can also be seen from the written submissions of the plaintiff, *inter alia*:

> 2.8 **The Developer amended the completion period from 36 months to 54 months in the prescribed statutory form in Schedule H.** At the time of execution of the SPA, the Developer did not inform the Purchaser that there was an EOT purportedly granted by the Controller of Housing ("the Controller") to extend the completion period.
>
> …
>
> 2.12 **In short, the Purchaser's case is that the Developer did not pay the full LAD amount calculated based on 36 months completion period as required by Schedule H of HDR 1989** which the Purchaser is entitled in law to receive the full statutory LAD. (emphasis added)

[33] In other words, the plaintiff is challenging the validity of both cls. 25 and 27 of the SPAs, from the date of the signing/execution of the SPAs. This challenge is premised on a breach of sch. H of the HDR 1989, as interpreted by the Federal Court in *Ang Ming Lee* (*supra*). The plaintiff is, therefore, challenging the validity of the purported amendment to both cls. 25 and 27 of the SPAs, from the inception or execution of the SPAs. The contractual breach that the plaintiff is complaining about is the purported amendment to both cls. 25 and 27 of the SPAs (see *Nasri v. Mesah*). Since the plaintiff is challenging both cls. 25 and 27 of the SPAs from the inception or execution of the SPAs, then the plaintiff's cause of action runs from the date of the execution of the SPAs, that is, on 11 July 2012 and 18 July 2012 respectively.

[34] Therefore, we agree with the learned judge that the plaintiff's claim is barred by limitation, as the six-year period had expired on 10 July 2018 and 17 July 2018, respectively. Since this suit was filed on 18 June 2020, limitation has already set in. On this ground alone, we would dismiss both appeals with cost.